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In The

Supreme Court of the United States

October Term, 1983

CAPITAL CITIES, MEDIA, INC., t/d/b/a THE WILKES-BARRE TIMES LEADER and NEP COMMUNICATIONS, INC. t/d/b/a WNEP-TV NEWS, THE ASSOCIATED PRESS, THE PENNSYLVANIA ASSOCIATION OF BROADCASTERS, and THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,

Petitioners,

vs.

PATRICK J. TOOLE, JR., Judge of the Court of Common Pleas of Luzerne County,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

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QUESTION PRESENTED

Is it a violation of the First Amendment for a trial judge, in a criminal prosecution with a sequestered jury, to prohibit indefinitely:

a) the publication of identities of jurors obtained by the news media from public records;

b) the publication or broadcast of photographs, sketches, and/or film of jurors made outside the courtroom; and

c) to restrict public and press access to trial exhibits admitted into evidence.[1]

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1. The parties to this action are: Capital Cities Media, Inc. t/d/b/a The Wilkes-Barre Times Leader and NEP Communications, Inc. t/d/b/a WNEP-TV News, The Associated Press, The Pennsylvania Association of Broadcasters, The Reporters Committee for Freedom of the Press and Patrick J. Toole, Jr., Judge of the Court of Common Pleas of Luzerne County.

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PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

OPINION AND ORDERS BELOW

The opinion and order of Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, is reported at 103 S. Ct. 3524 (1983) and appears in the appendix to this petition (1a-7a).

The order of the Supreme Court of Pennsylvania, dated June 30, 1983, is not reported and appears in the appendix to this petition (8a).

The orders of respondent, Honorable Patrick J. Toole, Jr., dated June 3, 1983 are not reported and appear in the appendix to this petition (9a-14a).

JURISDICTION

The trial court orders were entered on June 3, 1983. The Pennsylvania Supreme Court order was entered on June 30, 1983. The opinion and order of Circuit Justice Brennan was entered on July 13, 1983. The petition for certiorari is filed within ninety (90) days of the Pennsylvania Supreme Court order. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV, Section 1:

> ". . . nor shall any state deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

At issue in this case is the constitutionality of a broad restraint against publication of information obtained by the news media at public *voir dire* proceedings in a mass murder trial, and the constitutionality of severe restrictions on daily news coverage of the trial. Several days after representatives of petitioners attended *voir dire* proceedings, the trial court issued its orders barring publication of the identities of the jurors; prohibiting publication of photographs, sketches and/or film of jurors obtained anywhere, including outside the courtroom; and severely restricting public and press access to trial exhibits. The trial judge has stated unequivocally his intent to pursue criminal contempt charges against petitioners unless prohibited from doing so by this Court.

The present issue is supplemental to the issues raised in *Press-Enterprise Co. v. Superior Court,* No. 82-556 (*cert. granted,* January 24, 1983).

The record before the Pennsylvania Supreme Court was through a verified petition containing the following pertinent facts:

1. Capital Cities Media, Inc. t/d/b/a *The Wilkes-Barre Times Leader* is a publisher of a newspaper of general circulation in northeast Pennsylvania ("*Times Leader*").

2. NEP Communications, Inc. t/d/b/a WNEP-TV News is a television news broadcaster in northeast Pennsylvania ("NEP").

3. The Associated Press ("AP") is a membership non-profit corporation organized under the laws of the State of New York. It is a news wire service with the primary purpose of gathering, editing, and transmitting news reports and photographs to its 1350-member newspapers and its 3300-member broadcast stations throughout the United States and to other publishers throughout the world.

4. The Pennsylvania Association of Broadcasters is a trade association representing radio and television stations licensed for broadcasting in the Commonwealth of Pennsylvania.

5. The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to defending the First Amendment and the free flow of information to the public. The Reporters Committee, headquartered in Washington, D.C., has been involved in many significant recent media access cases, including *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976); *Gannett v. DePasquale*, 443 U.S. 368 (1979); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspapers v. Superior Court*, ____ U.S. ____, 102 S. Ct. 2613 (June 23, 1982).

6. On June 3, 1983 Patrick J. Toole, Jr., a judge of the Court of Common Pleas of Luzerne County, Pennsylvania issued orders, *sua sponte:*

> (a) prohibiting the news media from ever "in any way" publishing the identities of jurors even though their identities are matters of public record and were known to the news media prior to the issuance of the order (*see* appendix, 13a ¶2 and 10a ¶4);
>
> (b) absolutely precluding all sketches, photographs, film, or videotape of any juror, at any place, during their service in this case (*see* appendix, 14a ¶6);

(c) restricting news media access to trial exhibits in a manner that effectively barred publication of information admitted into evidence, even after the jury in the case was discharged (*see* appendix, 11a ¶¶11, 12).

7. The orders were issued as part of the trial in the case of *Commonwealth v. Banks,* Criminal Nos. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982, C.P., Luzerne County, Pennsylvania (the "*Banks*" case).

8. The *Banks* case was a murder trial arising out of the murder of 13 people and is a matter of local, state, and national interest.

9. The orders challenged by petitioners were issued without notice or a hearing, and without a determination on the record of the necessity for such orders or the availability of less drastic alternatives.

10. Defendant Banks, received a change of venire from Wilkes-Barre, Pennsylvania to Pittsburgh, Pennsylvania for jury selection.

11. The jury was sequestered from June 5, 1983 until the conclusion of the trial on June 22, 1983.

12. Testimony began on June 6, 1983 and the trial was concluded on June 22, 1983, with guilty verdicts and death sentences.

13. On June 6, 1983, a substantial number of photographs, film, and videotape was taken of the jurors outside of the Luzerne County Courthouse by representatives of numerous news gathering organizations, including petitioners.

14. On June 7, 1983, the *New York Times* published one such photograph, transmitted by AP, which Judge Toole believed was taken in violation of his orders.

15. Judge Toole warned members of the news media that violations of his orders would result in exclusion from the trial of the member of the media believed by Judge Toole to be in violation of his orders and the news organization on whose behalf that member was acting at the time. Violations of his orders would also be punishable by criminal contempt.

16. In addition, on or about June 9, 1983 Judge Toole, *sua sponte,* initiated an inquiry as to compliance/non-compliance with his June 3, 1983 orders. This inquiry consisted of calling individual news people into his chambers for questioning regarding the source of the photograph which appeared in the *New York Times* on June 7, 1983.

17. The questioning of individual news people was conducted outside the presence of counsel and without providing the individual news people with *Miranda* warnings.

18. Members of petitioner, *Times Leader,* were questioned by Judge Toole on or about June 10, 1983.

19. A representative of the Associated Press who was assigned to cover the trial of *Commonwealth v. Banks* was also questioned by Judge Toole regarding the photograph of jurors which was transmitted over the AP wire.

20. The representative of AP was informed by Judge Toole that AP would be precluded from further coverage of the trial if Judge Toole considered his orders to be violated in any way.

21. Judge Toole has stated his intention to turn over the results of his own inquiry to the district attorney for criminal investigation if not prevented from doing so by a higher court.

22. The representatives of the *Times Leader* and AP were precluded, pursuant to Judge Toole's orders, from inspecting documents, photos, tapes, and other items which were marked as exhibits at the trial of *Commonwealth v. Banks.*

23. Judge Toole's orders interfered with petitioners' First Amendment right to cover the news.

24. On June 13, 1983, counsel for petitioners conferred with Judge Toole in an effort to have him modify the offending portions of his orders, raising our constitutional concerns at that time. Our efforts were unsuccessful.

25. On June 13, 1983, after conferring with Judge Toole, petitioners filed with the Pennsylvania Supreme Court a verified "Application for Leave to File Original Process . . . and Application for Extraordinary Relief . . .", together with a verified complaint against Judge Toole seeking a writ of prohibition. *Capital Cities Media, Inc., et al. v. Toole,* No. 101 E.D. Misc. Dkt. 1983, Pennsylvania Supreme Court.

26. On the afternoon of Thursday, June 30, 1983, at approximately 3:30 P.M., counsel were informed by telephone from the office of the Prothonotary of the Pennsylvania Supreme Court that a one line per curium order was entered on the record in that case which stated:

"Application for Writ of Prohibition denied."

27. On the afternoon of Thursday, June 30, 1983, at approximately 3:45 P.M., counsel for petitioners was informed

by Judge Toole that Judge Toole would proceed with enforcement of his orders by criminal contempt unless prevented from doing so by your Court.

28. Against this background, applicants came before this Court and respectfully requested an immediate stay of the prior restraint orders of Judge Toole. *Capital Cities Media, Inc., et al. v. Toole,* No. A-1070 (Received July 2, 1983).

29. The application was entertained by the Honorable William J. Brennan, Jr. sitting as Circuit Justice. Circuit Justice Brennan issued an opinion and order on July 13, 1983 (*see* appendix to this petition 1a-5a), granting some of the relief requested, denying some of the relief as inappropriate for emergency action and referring petitioners back to the trial judge for access to the trial exhibits.[2]

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2. While portions of respondent Toole's orders were not appropriate for emergency relief because the trial had been concluded, they remain viable for review by this Court. Respondent Toole asserted two provisions in the Pennsylvania Rules of Criminal Procedure as the foundation for his orders. Those two rules state, in pertinent part:

> "Rule 326. SPECIAL ORDERS GOVERNING WIDELY-PUBLICIZED OR SENSATIONAL CASES. In a widely publicized or sensational case, the Court, on Motion of either party or on its own Motion, may issue a special order governing such matters as extra judicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the Courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an Order. In such cases, it may be appropriate for the Court to consult with representatives of the news media concerning the issuance of such a special Order."

(Cont'd)

30. On July 22, 1983, petitioners applied to respondent trial judge for access. The trial judge refused to hear the motion. On August 9, 1983, the motion for access to trial exhibits was heard by another common pleas judge who granted access. That decision was appealed to the Pennsylvania Superior Court by counsel for defendant Banks and the district attorney. *Commonwealth v. Banks, ex rel. Capital Cities Media, Inc., et al.*, No. 2135 and No. 2195 of 1983. The Pennsylvania Superior Court affirmed the lower court's grant of access to trial exhibits by orders issued on August 29, 1983.[3]

(Cont'd)

> "Rule 1111. SEQUESTRATION OF TRIAL JURORS. (a) The Trial judge may, in his discretion, order sequestration of trial jurors in the interests of justice. (b) When sequestration is ordered, each juror, including any alternate, shall be sequestered from the time of acceptance as juror until discharged. (c) Nothing in subsection (b) shall prevent a trial judge from ordering sequestration, at any time during a trial when the interests of justice require."

3. Surprisingly, while the question of access to trial exhibits, which respondent refused to hear, was pending before the Pennsylvania Superior Court, respondent issued the following order, again, *sua sponte:*

> "AND NOW, this 15th day of August, 1983, at 10 o'clock a.m., more than seventy-five (75) days having elapsed since the jury, sequestered in the above matter, was selected and sworn and more than fifty (50) days having elapsed since said jury returned its verdicts in both the trial and sentencing proceeding, the Court is now satisfied that the privacy and security of said jurors designed to be protected and promoted by the Order of June 3, 1983, has been satisfactorily accomplished and, accordingly, that provision of the Order of June 3, 1983, providing that: '2. No person shall print or announce in any way the names or addresses of any juror.' is hereby vacated *effective this date.* By the Court, /s/ Patrick J. Toole, Jr., J." (emphasis added).

REASONS FOR GRANTING THE WRIT

The orders of the trial judge in this case constitute direct prior restraints on publication of information legally obtained by the news media. These orders are in direct violation of constitutional principles established by this Court.

This Court has declared that any prior restraint on expression "comes to this Court with a 'heavy presumption' against its constitutional validity." *(citations omitted) Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 558 (1976). Thus, before a prior restraint may issue the trial judge must assess:

> "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained, pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." *Id.* at 562.

In this instance, the respondent trial judge unequivocally violated these constitutional standards. After members of the news media had attended the *voir dire* proceedings, the trial judge issued the challenged orders. He issued these orders without notice to the press, without an opportunity for a hearing, and without any record establishing they were necessary.

Though the trial in the case of *Commonwealth v. Banks* is long over, the need for action by this Court remains. If respondent's orders are allowed to stand, then other constitutionally proscribed trial orders of like effect can be issued with impunity. Given the likelihood that future trials will conclude before similar orders can be reviewed by higher courts, this issue will continue to evade appellate review. First Amendment freedoms are fragile enough without subjecting them to a race to th:

appellate court between the opening and the closing of a criminal trial. For this reason, this Court often considers matters which are capable of repetition, yet which would otherwise evade review. *Nebraska Press Assn. v. Stuart*, 423 U.S. 1327 (1975).

I. Publication of Identities of Jurors

Before a prior restraint can be imposed in this context, the trial judge must determine on the record that there is a danger of prejudice to the Sixth Amendment rights of the criminal defendant and that no alternative exists which would adequately protect those rights. *Nebraska Press Association, supra.* Particularly in criminal trials, restrictions on the press must be narrowly tailored to serve a compelling governmental interest. *Globe Newspaper Company v. Superior Court*, ____ U.S. ____, 102 S. Ct. 1613 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Further, any such restriction must be based on an individualized determination made before access is denied. *Globe Newspapers, supra.*

Here, the jury was selected from an area of Pennsylvania far removed from the scene of the crimes and it was sequestered immediately after it was empanelled. Thus, there was little danger that the jury would be prejudiced by trial coverage in the local media. There were no allegations that the defendant had committed these crimes in concert with others who remained at large. In addition, jurors were sheltered from the outside world by court officials. Therefore, any notion that jurors would be harassed by accomplices or friends of the defendant or unduly influenced by press coverage were purely speculative.

As Justice Brennan noted in granting an emergency stay of a portion of the trial judge's order:

> "Our precedents make clear, however, that far more justification than appears on this record would be necessary to show that this categorical, permanent prohibition against publishing information already in the public record was 'narrowly tailored to serve that interest', if indeed any justification would suffice to sustain a permanent order." *Capital Cities Media, et al. v. Toole,* A-1070 (Brennan, Circuit Justice, July 13, 1983).

II. Photographs, Film, Videotape and Sketches of Jurors

Some of the information in possession of petitioners is the likenesses of the jurors. This information was obtained by members of the press and the public from personal observation. The personal observation was obtained at public judicial proceedings, in public hallways and on public thoroughfares.[4] Some of this observation was memoralized in the form of photographs, films, videotapes, or sketches.

However, before petitioners could publish this information, they were required by Judge Toole to secure his permission. In so doing, respondent established himself as editor, with the power

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4. This case does not involve the right of a trial judge to control activities within the courtroom. Petitioners are not demanding here the right to photograph and sketch within the courtroom. Our objections to the trial court orders deal with the geographical totality of the ban imposed and the prohibition against sketching even from one's own memory. Petitioner, NEP, sought permission to sketch inside the courtroom from Judge Toole. That permission was granted with the restriction that no juror's face could appear in the sketches.

to determine what was or was not newsworthy.[5] As this Court has stated: "It has yet to be demonstrated how governmental regulation of this crucial (editorial) process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time," (*Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974). *See also, United States v. Brooklier*, ____ F. 2d ____ (9th Cir. 1982) (overturning restrictions on access to information revealed by prospective jurors in *voir dire*); *Angelico v. Louisiana*, 593 F. 2d 585 (5th Cir. 1979) (declaring restrictions on use of cameras in courthouse halls and outside entrances were too vague); *United States v. CBS*, 497 F.2d 102 (5th Cir. 1974) (overturning ban on broadcast of sketches made in and outside a courtroom during a criminal trial).

III. Access to Trial Exhibits

First Amendment considerations also apply to access to that portion of the public record composed of trial exhibits. During

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5. The trial judge appeared to base his decision upon language in Mr. Justice Rehnquist's response last year to an emergency request for a stay of an order restricting broadcast of sketches made by television artists present at a criminal trial:

> "I would think that of all conceivable reportorial messages that could be conveyed by reporters or artists watching such trials, one of the least necessary to appreciate the significance of the trial would be individual juror sketches." *KPNX Broadcasting Co. v. Arizona Sup. Ct.*, ____ U.S. ____, 74 L. Ed. 2d 498 (1982).

It is not clear from the *KPNX* decision that this personal observation was critical to Justice Rehnquist's decision not to stay the orders restricting use of sketches. Surely, some members of the news media believe the public should know the identities of jurors. In the instant case, AP ran a photo which UPI did not. The *N.Y. Times* printed a photo which other papers did not. Jurors' potential biases, prejudices and relationships to trial participants are matters of significant public concern, as they reflect directly upon the integrity of the justice system.

the course of this trial, petitioners were prohibited from seeing the trial exhibits or even from speaking with the official court stenographer. This prevented petitioners from securing such basic information as the correct spelling of witnesses' names or the correct number or identification of the numerous trial exhibits.[6]

If the First Amendment guarantee of access to criminal trials, as first recognized in *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980), is to have true vitality, then the public and press must be allowed to know the content of all evidence introduced at trial. Similarly, as the Ninth Circuit recently declared, having earlier recognized a First Amendment right to attend pretrial proceedings: "There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them." *Associated Press v. United States,* ____ F. 2d ____, 9 Med. L. Rep. 1617 (9th Cir. May 10, 1983) [*citing United States v. Brooklier,* 685 F. 2d 1162 (9th Cir. 1982)]. *See also, United States v. Dorfman,* 8 Med. L. Rep. 2249 (N.D. Ill. 1982) (ruling that the First Amendment right of access to wiretap materials cannot be denied absent a showing of compelling need); *United States v. Carpentier,* 526 F. Supp. 292 (E.D.N.Y. 1981) (denying on First Amendment grounds a government motion to seal ABSCAM audio tapes).

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6. When one of petitioners' news people requested copies of the exhibits, he was informed by Judge Toole that a formal motion by counsel would be required. When counsel for petitioners had verbally requested copies of exhibits, Judge Toole requested a written motion be filed to identify which exhibits were sought. There were 263 exhibits identified at the trial. Because no one outside of the parties, the trial judge and the court stenographer had access to the exhibit list, petitioners' written motion to Judge Toole on July 22, 1983 included a request for a copy of the exhibit list. When this motion was presented to Judge Toole he refused to entertain it and referred petitioners to the motions judge, who referred petitioners to the court administrator, who referred petitioners to the president judge, who set the matter for hearing before the miscellaneous court judge two weeks later. The exhibit list was not made available to petitioners until August 31, 1983, more than two (2) months after the conclusion of the trial.

Through his order, respondent sought to hold public information under his control, enabling him to disseminate it to those news organizations of his liking or at a time of his choosing. Nothing in our constitutional history supports such a tyranny by the judiciary. Respondent has no authority to control what portions of the public record the press may examine and print. All exhibits admitted into evidence are "in the public domain" and should be available to the press and public. *United States v. Gurney*, 558 F. 2d 1202, 1210 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

CONCLUSION

From the time the first pamphlet was distributed by a disgruntled colonist condemning a decision of the mighty British Crown, free press rights have been the rapier of the powerless. While sometimes the confrontation occurs between parties of significant resources, it does, occasionally, involve local newspapers attempting to wrest information from an overzealous county judiciary. The cutting edge of the First Amendment has not grown dull from lack of use. It should not be blunted from striking against the stone of the courthouse.

The issue of a court's ability to close *voir dire* proceedings to the press and the public is presently before the Court for review in the *Press-Enterprise* case. We are asking the Court to expand that review to include the issues of the trial judge's ability to prohibit publication of information obtained during *voir dire,* to prohibit the photographing and sketching of jurors outside the environs of the courtroom, and to delay press access to trial exhibits until the trial judge determines it is convenient. As public interest in the judiciary grows, demands by the press for access to information expand. This has been met by increasing resistance at the trial stage through orders similar to those of Judge Toole. Continued resort to appellate courts should not be required to obtain First Amendment guarantees. Petitioners are hopeful that review by this Court will obviate this problem.

Therefore, it is respectfully prayed that this Court grant a writ of certiorari, reverse the decision below, and grant a hearing to consider the rights of the press and the public in this context.

Respectfully submitted,

RALPH E. KATES, III
Attorney for Petitioners

APPENDIX

OPINION AND ORDER OF MR. JUSTICE WILLIAM J. BRENNAN, JR. IN *CAPITAL CITIES MEDIA, INC., ET AL. V. TOOLE*, ___ U.S. ___, 103 S. CT. 3524 (1983)

SUPREME COURT OF THE UNITED STATES

No. A-1070

CAPITAL CITIES MEDIA, INC., ET AL. *v.* PATRICK J. TOOLE, JR., JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

ON APPLICATION FOR STAY

[July 13, 1983]

JUSTICE BRENNAN, Circuit Justice.

This is an application for an immediate stay of several orders entered by the Court of Common Pleas of Luzerne County, Pennsylvania, in connection with a homicide trial in that court, *Commonwealth* v. *Banks*, Criminal Nos. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982, that had attracted a great deal of public interest. The specific orders in question were entered by respondent Judge Toole on June 3, 1983, after selection of the trial jury but before its sequestration. In one order, respondent directed first that "[n]o person shall print or announce in any way the names or addresses of any juror," Order in Accordance with Pa. Rules Crim. Proc. 1111(c), June 3, 1983, ¶2 (hereinafter ¶2), and also that "[n]o person shall draw sketches, photographs, televise or videotape any juror or jurors during their service in these proceedings . . . ," *id.*, ¶6 (hereinafter ¶6). In a separate order, Judge Toole ordered that "[n]o one, except attorneys of record, their agents, court personnel, witnesses and jurors may handle exhibits except by Order of the Court," Order Pursuant to Pa. Rules Crim. Proc. 326, June 3, 1983,

¶11 (hereinafter ¶11). The application for a stay was first presented to me on June 18, 1983, but I held it pending action by the Supreme Court of Pennsylvania on a substantially identical application for summary relief. On June 21, the jury returned a guilty verdict in the *Banks* case and was discharged; on June 30, the Supreme Court of Pennsylvania denied summary relief. Applicants immediately reapplied to me for a stay. An initial response was received by telegram on July 7, with a more complete response submitted on July 13.

In recent years, several Justices have had occasion to explain the role of a Circuit Justice in precisely this context, when a trial court has enjoined the press and other media from publication of information in connection with a criminal trial. Caution is the refrain of any Justice acting as Circuit Justice, but we have recognized the special importance of swift action to guard against the threat to First Amendment values posed by prior restraints. It is clear that even a short-lived "gag" order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect. When it appears that there is a significant possibility that this Court would grant plenary review and reverse the lower court's decision, at least in part, a stay may issue. *Nebraska Press Assn.* v. *Stuart*, 423 U. S. 1327, 1330 (1975) (BLACKMUN, Circuit Justice); *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, Circuit Justice). See also *Bonura* v. *CBS, Inc.*, —— U. S. —— (Jan. 16, 1983) (WHITE, Circuit Justice).

I address first the ¶2 provision, which on its face permanently restrains publication of the names or addresses of any juror. Counsel for respondent has informed the Clerk of this Court that this order remains in effect, and that publication at this time of the name of a juror would subject the publisher to the possibility of being held in contempt of court. This order was entered by the Court *sua sponte* and without a

hearing or a record; neither the prosecution nor defendant has expressed any interest in it. Compare *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979). The jury was selected at voir dire proceedings begun prior to the issuance of this order, from which the press and public were not excluded, and at which the names of the prospective jurors were not kept confidential. Compare *Press-Enterprise Co.* v. *Superior Court*, No. 82–556 (cert. granted Jan. 24, 1983).

It hardly requires repetition that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," and that the State "carries a heavy burden of showing justification for the imposition of such a restraint." *New York Times Co.* v. *United States*, 403 U. S. 713, 714 (1971) (*per curiam*). This Court has given plenary consideration to a number of state statutes and court orders issued thereunder restraining publication of information in connection with a criminal trial or restricting press access to a criminal trial for the purpose of preventing such publication. Just last Term, in *Globe Newspaper Co.* v. *Superior Court*, —— U. S. —— (June 23, 1982), we held that the First and Fourteenth Amendments prohibited enforcement of a rule barring press and public access to criminal sex-offense trials during the testimony of minor victims. We adopted a familiar standard: "Where, as in the present case, the State attempts . . . to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.*, at —— (slip op. 10); cf. *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97 (1979).

I assume, for purposes of argument only, that the State has a compelling interest in keeping personal information about jurors confidential in an appropriate case, either to assure the defendant a fair trial or to protect the privacy of jurors. Cf. *Globe Newspaper*, —— U. S., at —— (slip op. 11); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 600 (1980) (Stewart, J., concurring in the judgment). Our prece-

dents make clear, however, that far more justification than appears on this record would be necessary to show that this categorical, permanent prohibition against publishing information already in the public record was "narrowly tailored to serve that interest," if indeed any justification would suffice to sustain a permanent order. Based on these precedents, I must conclude that if the Supreme Court of Pennsylvania sustained this order on its merits, four Justices of this Court would vote to grant review, and there would be a substantial prospect of reversal.

Insofar as the State's interest is in shielding jurors from pressure during the course of the trial, so as to ensure the defendant a fair trial, that interest becomes attenuated after the jury brings in its verdict and is discharged. Cf. *Gannett Co.* v. *DePasquale*, 443 U. S., at 400 (POWELL, J., concurring). As for the State's concern for the jurors' privacy, we have not permitted restrictions on the publication of information that would have been available to any member of the public who attended an open proceeding in a criminal trial, *Oklahoma Publishing Co.* v. *District Court*, 430 U. S. 308, 311–312 (1977) (*per curiam*); *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 568 (1976), even for the obviously sympathetic purpose of protecting the privacy of rape victims, *Globe Newspaper*, —— U. S., at —— (slip op. 11–12); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 491–496 (1975). See also *Smith* v. *Daily Mail*, 443 U. S., at 104: "If the information is lawfully obtained . . . the state may not punish its publication except when necessary to further an interest more substantial than is present here"—*i. e.*, protecting the privacy of an 11-year-old boy charged with a juvenile offense. In an extraordinary case such a restriction might be justified, but the justifications must be addressed on a case-by-case basis, with all interested parties given the opportunity to participate, and less restrictive alternatives must be adopted if feasible. *Globe Newspaper*, —— U. S., at ——, and n. 25 (slip op. 12); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 580–581 (1980) (opinion of THE CHIEF JUSTICE);

Landmark Communications, Inc. v. *Virginia*, 435 U. S. 829, 842–843 (1978). The ¶2 order was entered without a hearing, and without findings of fact that would justify it; respondent has suggested no concern specific to this case in support of his order. Accordingly, I grant applicant's request for a stay of the ¶2 provision.

It would be inappropriate for me to grant a stay of the ¶6 or ¶11 provisions. By its terms, the ¶6 provision applied only "during [the jurors'] service in these proceedings." Since the jury has been discharged, this particular provision can no longer have effect. It may be that such an order, although it had expired, could be still receive appellate review in this Court under the "capable of repetition, yet evading review" doctrine, see *Nebraska Press Assn.*, 427 U. S., at 546–547, but there is no prospect of immediate injury to applicants before they can seek review of the order, so their application for a stay must be denied. As for the ¶11 provision, restricting access to exhibits, applicants have neither identified the exhibits to which they seek access, nor have they indicated that they have sought a court order permitting them access. The application for a stay of the ¶11 provision is denied without prejudice to its renewal in the event a request for access to exhibits is denied by the trial judge.

I shall issue an order accordingly.

Order

SUPREME COURT OF THE UNITED STATES

No. A-1070

CAPITAL CITIES MEDIA, INC., ET AL.,

Applicants,

v.

PATRICK J. TOOLE, JR., JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

ORDER

UPON CONSIDERATION of counsel for the applicants and the response and reply thereto,

IT IS ORDERED that paragraph No. 2 of the order of the Court of Common Pleas of Luzerne County, Pennsylvania, Criminal Case Nos. 1290, 1506, 1507, 1508, 1519, 1520, 1524, entered in accordance with Pa. Rules Crim. Proc. 1111(c), June 3, 1983, restraining publication of the names and addresses of jurors, be, and the same is hereby, stayed pending the timely filing and disposition of a petition for a writ of certiorari or jurisdictional statement. Should the petition for a writ of certiorari be denied or should the appeal be dismissed, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted or probable jurisdiction is noted or postponed, this stay shall continue in effect pending the issuance of the mandate of this Court.

THE APPLICATION FOR STAY is denied as to paragraph No. 6 of said order, which prohibits any person from sketching or photographing jurors during their service, because it appears

that the order is inoperative as to its own terms. The application for stay of paragraph No. 11 of the Order Pursuant to Pa. Rules Crim. Proc. 326, June 3, 1983, which restricts access to exhibits, is denied without prejudice to its renewal in the event a request for access to exhibits is denied by the trial judge.

s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 13th
day of July, 1983

Clerk of the Supreme Court
of the United States
By Christopher W. Vasil
Deputy

ORDER OF THE PENNSYLVANIA SUPREME COURT IN *CAPITAL CITIES MEDIA, INC., ET AL. V. TOOLE,* (UNREPORTED) JULY 30, 1983

IN THE SUPREME COURT OF PENNSYLVANIA

No. 101 E.D. Misc. Dkt. 1983

Original Process

CAPITAL CITIES MEDIA, INC., t/d/b/a THE WILKES-BARRE TIMES LEADER and NEP COMMUNICATIONS, INC., t/d/b/a WNEP-TV NEWS,

Applicants

v.

PATRICK J. TOOLE, JR., JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

PER CURIAM FILED: JUNE 30, 1983

Application for Writ of Prohibition denied.

ORDERS OF JUDGE PATRICK J. TOOLE, JR. IN *COMMONWEALTH OF PENNSYLVANIA V. BANKS*, CRIMINAL NOS. 1290, 1506, 1507, 1508, 1519, 1520, 1524 OF 1982, COMMON PLEAS OF LUZERNE COUNTY, PENNSYLVANIA (UNREPORTED) JUNE 3, 1983

IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY * CRIMINAL

NOS. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982

AND NOW this 3rd day of June, 1983, the undersigned, pursuant to Pa. R. Crim. P. 326, finds and concludes that the following rules and regulations are necessary to protect and promote the orderly administration of justice in this matter and it is therefore

ORDERED, DIRECTED AND DECREED:

1. That all unauthorized persons, including personnel from the news media and general public, are prohibited from being in and shall be excluded from the security areas outlined on the attached drawings whenever the defendant and/or jurors are being escorted to or from the elevator or the building.

2. No cameras, photographic, television, radio or sound equipment, including tape recorders will be permitted in or on any security area outlined on the attached drawings whenever the defendant and/or jurors are being escorted to or from the elevator or the building.

3. That the southwest entrance way to the basement of the Court House and the corridors and approaches to the elevator in the basement of the Court House, and all entrances and approaches to the assigned courtroom on the third floor of the Luzerne County Court House, will be clear at all times for free

access thereto by those using them in the course of their employment or those having business to transact therein.

4. No attempt shall be made by anyone to talk to, record or photograph, televise or videotape any juror or jurors at any time during their service in this case.

5. No person shall be permitted to in any way, directly or indirectly, interfere with, obstruct or impede the passage or transfer of the defendant in or out of the Court House during these proceedings.

6. All spectators to the proceedings shall be seated at least three (3) minutes prior to the scheduled beginning of any trial session. Once a trial session begins the Court Room doors shall be secured and no one will be permitted to enter the courtroom until an authorized recess. No one inside will be permitted to leave the courtroom during any session, except with permission of Court, or in case of an emergency, recess or adjournment.

7. At any recess or adjournment, and at any other time the jury is retiring from the courtroom or the defendant is being escorted therefrom, the spectators shall remain seated in the courtroom until the jury and/or the defendant have had ample time to withdraw and said spectators have been given permission to disburse.

8. A uniformed Deputy Sheriff, in addition to regular court personnel, shall be assigned to insure courtroom security and compliance with this Order during the entire trial.

9. An adequate number of court personnel shall be assigned during all trial proceedings for trial control in the public corridor of the third floor and/or basement of the Court House.

Order

10. The bar of the court within the rail is reserved for the defendant, counsel and court personnel. No one else will enter said area without prior authorization of the trial Judge.

11. No one, except attorneys of record, their agents, court personnel, witnesses and jurors may handle exhibits except by Order of Court.

12. The official Court reporter assigned to this proceeding shall not release or divulge the contents of her notes of the testimony or the evidence presented by any person, nor shall any transcript of these proceedings in this matter be released by the reporter to any person unless and until a copy of such transcript has been ordered by and delivered to and approved by the Court.

13. No sketches may be made in the courtroom during the course of this trial without prior authorization of the trial Judge.

14. All lawyers participating in this case, their assistants, office associates, staff members, investigators and employees under their supervision and control are prohibited from taking part in public interviews and from making extra judicial statements about this case until such time as the jury is discharged.

15. All court employees, as well as employees of the Clerk of Courts, Prothonotary, County Sheriff, Coroner, police officials and other law enforcement officers, their associates, deputies, assistants, staff members and personnel under their supervision and control are prohibited from taking part in or giving public interviews and from making extra judicial statements about this case until such time as the jury is discharged.

16. All witnesses and jurors are prohibited from taking part in or giving any public interviews and from making extra judicial statements about this case until such time as the jury is discharged.

Order

17. Nothing in this Order shall prohibit any witness from discussing any matter in connection with the case with any of the attorneys representing the defendant or the Commonwealth, or any representative of such attorneys.

BY THE COURT,

s/ Patrick J. Toole, Jr.

J.

cc: District Attorney
Basil Russin, Esq.
Joseph Sklarosky, Esq.
Albert Flora, Esq.
Court Administrator

Order

IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY • CRIMINAL

NOS. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982

COMMONWEALTH OF PENNSYLVANIA

v.

GEORGE E. BANKS

AND NOW this 3rd day of June, 1983, the undersigned, in accordance with Pa. R. Crim. P. 1111(c),

ORDERS AND DIRECTS that the jurors selected and empanelled in the above captioned matter shall be sequestered from the time they depart from Pittsburgh, Allegheny County, on Sunday, June 5, 1983, until such time as the said jury is finally discharged. In addition, in order to protect and promote the privacy and security of the jurors and to assure compliance with this sequestration Order, IT IS FURTHER

ORDERED AND DIRECTED:

1. That no person shall in any way, directly or indirectly, interfere with, obstruct or impair the movement of the jury to or from the Court House.

2. No person shall print or announce in any way the names or addresses of any juror.

3. Security personnel shall be provided at the hotel in which the jury shall be sequestered on a 24 hour basis.

4. The jurors shall, from the time of their departure, be under the supervision and control of duly authorized Court personnel.

Order

5. No telephone calls may be made or received by any juror while sequestered without explicit authorization of the trial Judge.

6. No person shall draw sketches, photographs, televise or videotape any juror or jurors during their service in these proceedings except that jurors may, with Court authorization, take pictures of and with consenting fellow jurors.

BY THE COURT,

s/ Patrick J. Toole, Jr.

J.

cc: District Attorney
Basil Russin, Esq.
Joseph Sklarosky, Esq.
Albert Flora, Esq.
Court Administrator